pouch for oral use by a user. Applicants' invention does not concern providing smoking tobacco substitutes. Applicants' product has not been tested as a smoking substitute and would be totally destroyed if put to the match.

Applicants' invention has two key aspects that are neither taught nor suggested by the prior art. These are a carrier consisting of an edible cellulosic plant material dried to a moisture content of at or below 8% by weight with the plant material having at least 30% intact cell walls.

Beyond the features set forth above, Applicants' system is enhanced by using a water soluble but not water containing flavor ingredient in liquid form that is capable of entering the intact cell walls of the plant material, wherein it is held and provides a slow release during chewing of the cellulosic plant material if it is in loose form.

The Examiner has rejected claims 1-8 and 18-25 under 35 U.S.C. § 103(a) over Buchmann et al. U.S. Patent 3,867,951.

At the outset applicants respectfully submit that the Examiner has fully used applicants own teaching to not only select the Buchmann et al. reference but to interpret the Buchmann et al. reference as rendering applicants examined claims unpatentable.

To begin with Buchmann et al. neither teach nor suggest processing a plant material to maximize flavor absorption. Buchmann et al. neither teach nor suggest an oral flavor delivery system. Buchmann et al. were concerned with material that can be ignited and smoked as ordinary smoking (e.g. cigarette) tobacco.

In point of fact, Buchmann et al. takes their basic material i.e. the plant material and comminutes it to a consistency of paste so that it can be formed into a sheet, which sheet material can then be cut up into a form that is used for a smoking tobacco product.

Contrary to the Examiner's allegation Buchmann et al. are only concerned with a 1 to 10% moisture content in the solidified product after it is formed from a paste like material into a sheet so that it can be readily shredded to a simulate real tobacco used in a smoking applications such as in a cigarette or a pipe. Contrast this with applicants' invention which takes the cellulosic material and dries it to control the moisture content of the cellulosic material without turning it into a paste and then reconstituting it as a sheet which is then shredded to the physical shape required. Clearly, the Examiner is taken bits and pieces of Buchmann et al. out of context and equating them with applicants' invention. Applicants' invention is neither taught nor suggest by Buchmann et al., since applicants do not prepare a paste which is then formed into a sheet, exposed to water vapor to increase the level of moisture in the sheet, which is then cut up for use as a smoking tobacco.

The Examiner's logic escapes applicants because the Examiner admits that Buchmann et al. do not talk about the intact cell walls in any material they use. It is submitted that they can neither teach or suggest a quantity of intact cell walls because none are left. It is quite obvious that any material that is rendered into a paste has been so finely ground that there is little or anything of the original structure left. By the same token the Examiners' logic can be used to show, that since Buchmann et al's. disclosure is silent about intact cell walls Buchmann et al. is silent and does not care whether there are any remaining intact cell walls and to what extent, if any, there are remaining cell walls. Contrast this to applicants disclosure which requires at least 30% intact cell walls to provide a long lasting flavor delivery system.

Buchmann et al. mention cabbage as a material that they can use in their smoking tobacco substitute. However, none of the examples of Buchmann et al. use cabbage for their product. In all of the materials recited by Buchmann et al., which go from tealeaves to straw to pine needles to oak leaves to oat bran, they neither show or suggest use of cabbage dried to a moisture content at or below 8% by weight with the cabbage having at least 30% intact cell walls. Other than including it in a laundry list of materials, the use of cabbage leaves as a smoking tobacco substitute let alone the use of

cabbage leaves as forming the basis of a smokeless or chewing tobacco is neither proven or disproven. The Examiner argues that Buchmann et al. may not indicate that their product can be used in a granular form having a specific size distribution but that it should be comminuted carefully. However, what Buchmann et al. were referring to was comminution of the material to make a paste, not comminution of the sheet material made from the paste. Buchmann et al's. concern with aroma is in the fact that there is a large quantity of flavoring material that is included in the paste. When the paste is prepared the grinding is carefully controlled, e.g. as to temperature, so that the flavor is not lost.

Applicants specifically point the Examiner to column 5, lines 1 through 5 and column 6, lines 1 through 4, wherein Buchmann et al. describe their invention as:

> "Then the paste is spread out onto a sheet dried by means of warm air and, after cooling, moistened again with water vapor and adjusted to a moisture content of about 10% in reference to the dry weight. The sheet, which is elastic and strong is divided into pieces having a same size as the natural leaves and processed into smokable articles such as cigarettes, cigars, pipe tobacco and the like, in the same manner as the natural leaves or intermixed with such leaves."

Applicant respectfully submit that Buchmann et al. have to adjust the moisture content by moistening the sheet formed from the paste material. Contrast this with applicants' invention which dries the natural material to a specific moisture content. Applicant's cellulosic material is not rehydrated using water vapor. Furthermore, applicants invention has nothing to do with forming a sheet of material which is then cut up into size which resembles natural tobacco material. Nor is applicants invention concerned with using real tobacco material in a final product.

Applicant's reduce or size the cabbage in its raw form. Buchmann et al. size the paste material to a very fine consistency paste that can be formed into a sheet material. Thereafter the material is cut to size of smoking tobacco. Applicants are not concerned with a material that represents or resembles smoking tobacco in size.

Buchmann et al. neither teach or suggest control of the size of final material except to replicate the appearance of smoking tobacco.

Buchmann et al. start with a sheet material or a material that can be molded. Applicants do not mold anything as their compositions are prepared by sizing the carrier which is the cellulosic material prior to introducing the flavoring and the humectant. Applicants respectfully submit that colloidal particles and fine granular particles are not the same size. Colloidal particle sizes are in the micron range. Applicants particle sizes are in the inch or fraction of an inch range as denoted by the use of the standard sieve series to size the particles.

In view of the foregoing it is respectfully submitted that the rejection of claims 1-8 and 18-25 under 35 U.S.C. § 103(a) is not well taken and should be withdrawn.

The Examiner has rejected claims 9 and 26 under 35 U.S.C. § 103(a) over Buchmann et al. in view of Nonomura et al. U.S. Patent 5,597,400. For the reasons set forth above it is respectfully submitted that the primary reference fails to teach or suggest applicants' invention. The use of Nonomura et al. which is drawn to a plant growth stimulating material neither teaches nor suggests the use of plant materials in a flavor delivery system.

Applicants respectfully submit that claims 9 and 26 are not product by process claims. Claims 9 and 26 define a plant material as freeze dried green cabbage classified as brassica oleracea capitata. It is well known in the food art that freeze drying does not change the basic material except to remove moisture from the material. Thus the cabbage is the same before or after freeze drying except that after freeze drying it is devoid of moisture. This

does not change the basic cabbage material and thus there is no product by process.

Therefor applicants', for the reasons set forth above, respectfully submit that the rejection of claims 9 and 26 under 35 U.S.C. § 103(a) is not well taken and should be withdrawn.

Applicants can not too strongly urge that the Examiner has fallen into the trap of using their teaching to not only select but to interpret the references, a procedure which is clearly contrary to existing Patent Law.

In view of the foregoing amendments and arguments it is respectfully submitted that claims 1-9 and 18-26 are allowable and a notice to that effect is earnestly solicited.

Respectfully Submitted,

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The Assistant Commissioner for Patents is hereby authorized to charge payment to Deposit Account No. **18-0350** of any fees associated with this communication.

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail, with sufficient postage, in an envelope addressed to: Assistant Commissioner for Patents, Washington, D.C. 20231 on:

17 September 2002

James C Simmons